COUNT 3

1. The Grand Jury realleges, and hereby incorporates by reference, all of the allegations of Count 1 of this indictment with the exception of those contained in paragraph 13 thereof.

2. On or about November 3, 1965, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, knowingly, willfully and unlawfully caused to be delivered in the District of Columbia by the United States mails according to the directions thereon an envelope and letter addressed to William Jones, 2701 24th Street, N.E., Washington, D.C.

(Violations 18 U.S.C. 1341 and 2)

COUNT 4

1. The Grand Jury realleges, and hereby incorporates by reference, all of the allegations of Count 1 of this indictment with the exception of those contained in paragraph 13 thereof.

2. On or about December 16, 1965, in the District of Columbia, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, knowingly, willfully and unlawfully did transmit and cause to be transmitted in interstate commerce by means of a wire communication, sounds, to wit, a telephone call between Allied Enterprises, Inc., 4550 Rhode Island Avenue, North Brentwood, Maryland and Allie Mae Asberry, 115 5th Street, N.E., Washington, D.C.

(Violations 18 U.S.C. 1343 and 2)

COUNT 5

1. The Grand Jury realleges and hereby incorporates by reference, all of the allegations of Count 1 of this indictment with the exception of those contained in paragraph 13 thereof.

2. On or about December 23, 1965, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, William R. Marion, Sr., and Samuel C. Cratch, Jr.,

the defendants, knowingly, willfully, and unlawfully caused to be delivered in the District of Columbia by the United States mails according to the directions thereon an envelope and letter addressed to Mrs. George H. Staley, 4643 Minnesota Avenue, N.E., Washington, D.C.

(Violations 18 U.S.C. 1341 and 2)

COUNT 6

On or about August 9, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signature Lucille N. Brooks, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 7

On or about August 12, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures Alonzo Shearer and Thelma Shearer, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 8

On or about August 20, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signature Rosa Johnson,

knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 9

On or about September 5, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures Lawrence Hatton and Edna Hatton, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 10

On or about September 10, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled, "Deed of Trust" and "Promissory Note" bearing the signature Inez Johnson, knowing the same to have been falsely made, forged, and altered.

(Violations of 18 U.S.C. 2314 and 2)

COUNT 11

On or about October 4, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures Bettie P. Staley and Sereta S. Staley, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 12

On or about October 26, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signature Rev. Andrew Williams, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 13

On or about October 30, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures William Jones and Evelyn Jones, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 14

On or about December 19, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures James Gray and Marion Gray, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 15

On or about December 21, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful

and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signature Sherman Webster, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 16

On or about December 23, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signature Allie Mae Asberry, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 17

On or about December 27, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures Samuel Duncan and Alice Duncan, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 18

On or about January 1, 1966, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered

securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures George Crutchfield and Ruth Crutchfield, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 19

On or about January 19, 1966, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signature Geneva Gardner, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

____ ____,
Attorney of the United States,
in and for the District of Columbia.

A True Bill:

____ ____,
Foreman.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA *Plaintiff*	
v.	Criminal No. 672-70
WILLIAM R. MARION, SR., ET AL. *Defendants*	

MOTION TO DISMISS INDICTMENT FOR FAILURE TO AFFORD SPEEDY TRIAL

The defendant WILLIAM R. MARION, SR., moves to dismiss the indictment for failure to commence prosecution of the alleged offenses charged therein within such time as to afford him his rights to due process of law and to a speedy trial under the Fifth and Sixth Amendments to the Constitution of the United States.

For reason therefor, he says:

1. That the indictment charges that defendant engaged in a "scheme and artifice to defraud" from March 15, 1965, through February 6, 1967, but that no event is alleged therein to have occurred after January 19, 1966.

2. That he is informed and believes, and accordingly alleges, that the events charged in the indictment to constitute criminal offenses were the subjects of a series of articles appearing in *The Washington Post* newspaper, a daily newspaper of general circulation in the greater Washington, D. C., Metropolitan area, in October of 1967, and were thus matters of public knowledge as of that time.

3. That, to his best recollection, in the summer of 1968, this defendant voluntarily delivered to Seymour Glanzer, Esq., and Sandor Frankel, Esq., Assistant United States Attorneys for the District of Columbia, at their request, all of the files of Allied Enterprises, Inc., and that said files have at all times thereafter remained in the possession of

the Office of the United States Attorney for the District of Columbia.

4. That, to his best recollection, in the summer of 1968, the defendant voluntarily discussed his activities as an officer of Allied Enterprises, Inc., with the said Seymour Glanzer and Sandor Frankel, Esqs., at their request, and that he fully apprised them of such activities, all of which were, in his opinion, of an entirely innocent nature.

5. That, notwithstanding the foregoing, the Grand Jury herein was not impanelled until September 2, 1969, and defendant was not apprised that the events alleged in the indictment were under consideration by a Grand Jury until advised by counsel that a subpoena had been issued to command his testimony before the same on or about March 16, 1970.

6. That the delay of over five years from the time defendant is first alleged to have commenced the alleged "scheme and artifice" to defraud, of over four years from the time the last event charged in the indictment allegedly occurred, and of nearly three years from the time at which such events became matters of general public knowledge, to the time of filing of the indictment herein, is an unreasonably oppressive and unjustifiable time after the alleged offenses.

7. That the indictment charges defendant with numerous general misrepresentations allegedly made to divers persons, on dates unspecified; with numerous instances of telephone and postal communication of a nature undescribed; and with numerous instances of interstate transportation of securities allegedly false, forged, and altered in respects unknown, over a period of approximately 23 months more than three years past; and, further, that the indictment charges defendant as both principal and aider and abetter as to each.

8. That it is unreasonable and oppressive, and in violation of his rights under the Fifth and Sixth Amendments to the Constitution of the United States, to require the defendant to answer and defend against charges of stale offenses, under circumstances requiring precise memory of events long past, and the production of evidence, both testimonial

and documentary, which may have become unavailable by the passage of time.

JACKSON, GRAY & LASKEY.
By /s/ *T. P. Jackson*
Thomas Penfield Jackson

By /s/ *James P. Schaller*
James P. Schaller
1828 L Street, N. W.
Washington, D. C. 20036
466-8850
Attorneys for Defendant Marion

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss Indictment for Failure to Afford Speedy Trial was mailed, postage prepaid, this 5th day of May, 1970, to Sandor Frankel, Esq., Assistant United States Attorney, Room 3136-C, United States Courthouse, Third and Constitution Avenue, N. W., Washington, D. C. 20001.

/s/ *James P. Schaller*
James P. Schaller

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA *Plaintiff* v. WILLIAM R. MARION, SR., ET AL. *Defendants*	Criminal No. 672-70

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT MARION'S MOTION TO DISMISS INDICTMENT FOR FAILURE TO AFFORD SPEEDY TRIAL

The development of the case law in this connection tends to indicate that the Sixth Amendment guarantee seeks to provide a safeguard (1) to limit the possibilities that long delay will impair the ability of an accused to defend himself; (2) to prevent undue and oppressive incarceration prior to trial; and (3) to minimize anxiety and concern accompanying public accusation. Two of these three guarantees preponderate in the consideration of the Sixth Amendment relevant to the instant case.

As early as 1956, the United States Court of Appeals for the District of Columbia Circuit held unequivocally in the case of *Taylor v. United States,* 99 U. S. App. D. C. 183, 238 F. 2d 259, that failure to bring a defendant to trial until that year for crimes allegedly committed in 1950, was denial of his constitutional right to a speedy trial and required reversal, even though the delay was caused by imprisonment of defendant for another offense in absence of a showing of a reasonable effort by the Government to obtain the defendant's return to the local jurisdiction.

In *Ross v. United States,* 121 U.S.App.D.C. 233, 349 F. 2d 210 (1965) in a *per curiam* reversal of a narcotics violation conviction on grounds of denial of Due Process because defendant was unable to defend himself, where the Complaint against him was not sworn out until seven months after the alleged offense and, apart from the narcotics, the prosecution's case consisted solely of the testimony of a

single policeman, who had to refresh his memory from a notebook (and where defendant was unable to recall the events of the day of the offense), the Court found that the record did not support the Trial Court's conclusion of no showing that the witnesses' memories were impaired by the delay.

> "The record before us is, thus, one which shows (1) a purposeful delay of seven months between offense and arrest, (2) a plausible claim of inability to recall or reconstruct the events of the day of the offense, and (3) a trial in which the case against appellant consists of the recollection of one witness refreshed by a notebook." *Ross v. United States, supra,* 121 U.S.App.D.C. at 238, 349 F. 2d at .

One week prior to the decision in *Ross,* Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia Circuit had held, in the case of *Hanrahan v. United States,* 121 U. S. App. D. C. 134, 348 F. 2d 363, that:

> "In some cases, where the delay is uncommonly long and, therefore, the likelihood of prejudice quite high, the reason for the delay may be of little significance." *Hanrahan v. United States, supra,* 121 U. S. App. D. C. at 138, 348 F. 2d at 367.

Judge Wright indicated that two questions were of primary importance.

> ". . . First, did the prosecutor exercise reasonable diligence in seeking . . . indictment?
>
> * * *
>
> "[Was] . . . the prosecution conducted with such disregard of appellant's interests that it can be said that the delay resulted from deliberate, *or at least negligent,* actions on the part of the prosecutor . . . ?" *Hanrahan v. United States, supra,* 121 U. S. App. D. C. at 139, 348 F. 2d at 367-368.

If so, then, unless the prosecutor can show that the accused suffered no serious prejudice "beyond that which ensued from the ordinary and inevitable delay," the Court concluded ". . . appellant's Sixth Amendment rights have been denied and the conviction must be vacated and the

indictments dismissed." *Hanrahan v. United States, supra,* 121 U. S. App. D. C. at 139, 348 F. 2d at 368.

On remand, the District Court, per Sirica, J., at 255 F. Supp. 957, (D.C.D.C., 1966) held that the delays were not caused by arbitrary, capricious, vexatious, oppressive, deliberate or negligent conduct on the part of the Government and that *defendants suffered no serious prejudice* as a result of the delays which did not ensue from the ordinary and inevitable delay.

The District Court did not refer to the opinion of the Supreme Court in the case of *United States v. Ewell,* 383 U. S. 116, 15 L. Ed. 2d 627, 86 S. Ct. 773 (1966), but reflected the approach taken therein by requiring some showing of (1) prejudice to the defendant; (2) capriciousness, purposiveness, vexatiousness, etc. on the part of the prosecutor; (3) negligence on the part of the prosecutor.

Also in 1966, the Tenth Circuit Court of Appeals in the case of *Hampton v. State of Oklahoma,* 368 F. 2d 9, reiterated (1) that mere passage of time does not establish an unconstitutional delay of speedy trial or due process and (2) that the right to speedy trial is relative and must be determined in light of circumstances. More significantly, the Court held that a defendant cannot "sit by without effort to obtain an earlier trial or himself contribute to the delay and thereafter be heard to complain."

Nevertheless, the Court in *Hampton,* felt that enough appeared, "considering the application as a whole," to require an examination of the circumstances at an evidentiary hearing and the making of findings of fact and, therefore, reversed a judgment denying appellant's application for writ of habeas corpus without an evidentiary hearing.

In *Mathies v. United States,* 126 U. S. App. D. C. 98, 374 F. 2d 312 (1967), then-Circuit Judge Burger held that a speedy trial claim is waived unless the right is asserted promptly, the appellant in that case having failed to move to dismiss the indictment for unnecessary delay under Rule 48(b), Federal Rules of Criminal Procedure, which, according to the Court, ". . . places a greater requirement of speed on the prosecution, and permits dismissal of an indictment, even though there has been no constitutional violation." [citing *Mann v. United States,* 113 U. S. App. D. C. 27, 30-31, 304 F. 2d 394, 398].

Judge Burger also found that the lapse of four and one-half months between defendant's arrest and return of the indictment was not, *per se*, sufficient grounds upon which to grant appellant's motion to dismiss the indictment, because appellant had made no showing of unnecessary delay and did not claim prejudice as a result of the delay, unlike the situation in the instant case. Accord: *Fleming v. United States*, 378 F. 2d 502 (1st Cir. 1967).

In *Harrison v. United States*, 128 U. S. App. D. C. 245, 387 F. 2d 203 (1967), the Court, per Robinson, J., held that a six-year lapse between an alleged homicide and the *third* murder trial of defendant was not, upon consideration of all attending circumstances, including an interval of two years in which an appeal from the second trial was pending because of the decision first, by a panel of the Court of Appeals and then, a decision by the entire Court, a purposeful or oppressive delay such as to violate the constitutional guarantee of the right to speedy trial.

> ". . . In determining whether the delay complained of assumes Constitutional proportions, we examine the circumstances closely, to ascertain whether it was 'arbitrary, purposeful, oppressive or vexatious.'" *Harrison v. United States, supra*, 128 U. S. App. D. C. at 249, 387 F. 2d at 207.

Additionally, the Court in *Harrison*, was "unable to identify any harm to appellants consequent upon the passage of time." *Harrison v. United States, supra*, 128 U. S. App. D. C. at 250, 387 F. 2d at 208.

In *Klopfer v. North Carolina*, 386 U. S. 213, 18 L. Ed. 2d 1, 87 S. Ct. 988 (1967), the case which incorporated the Sixth Amendment into the Fourteenth Amendment and thus made it binding upon the several States, Chief Justice Warren held for the Court that even though the defendant was free on bond and thus permitted to go "whithersoever he will", a State Court's entry, over defendant's objection, of a *nolle prosequi*, with leave to reinstate at a future date a prosecution for trespass committed by participation in a Civil Rights demonstration in a restaurant, violates "by indefinitely prolonging the oppressive effects of the pendency of the indictment . . . as well as prolong[ing] the anxiety and concern accompanying public accusation . . ." defendant's Sixth Amendment right to a speedy trial.

Wilkins v. United States, 129 U. S. App. D. C. 397, 395 F. 2d 620 ( ) and *Harling v. United States*, 130 U. S. App. D. C. 327, 401 F. 2d 392 (1968), appear, at first blush, to be somewhat at odds with the philosophy of *Klopfer*, but only to the extent that it has been held the policy of the Court to grant preference to cases in which a defendant was incarcerated pending trial and to the extent that there was no claim that the defense was impaired or proof lost and the Government's case was "exceptionally strong." But see *Blunt v. United States*, 131 U. S. App. D. C. 306, 404 F. 2d 1283 (1968), where Chief Judge Bazelon held that the likelihood or even the "reasonable possibility" that the defendant has been prejudiced by the alleged delay is "a factor to be considered in whether there has been a denial of a speedy trial." But in *Blunt*, the Court found the cause of the delay to have been the deliberate pace of a system of safeguards designed to protect the accused, and so indicated that it would be reluctant to find a Constitutional infirmity in even cases involving very long delays. Similarly, in *Sims v. United States*, 132 U. S. App. D. C. 111, 405 F. 2d 1381 (1968), where the circumstances included determination of numerous and varied pre-trial issues raised by the defendants themselves, a sixteen-month delay between arrest and joint trial of several defendants was held no denial of the right to a speedy trial.

The most interesting recent case on this issue is *Smith v. United States*, U. S. App. D. C., , 418 F. 2d 1120 (1969). There, the Court found that an unexplained delay of 13 months between arrest and trial—no part of which could be attributed to the conduct of appellant or his counsel—shifts to the prosecution "a heavy burden of showing that there was no prejudice to the defense." *Id*, 418 F. 2d at 1122-1123. Oddly enough, while finding unequivocally that the prosecution failed utterly to meet this burden, the Court nevertheless retreated from adopting a rule that would require dismissal of the indictment, largely on the grounds (1) that appellant failed to make out even a *prima facie* case of prejudice and (2) that the delay was primarily attributable to the "unusual strain upon prosecutorial and judicial resources" which exists at present and

> ". . . [t]he legislature ha[ving] been apprised of the problem . . . we may appropriately accommodate our

> doctrines to permit fine for provision of resources necessary to dispose of criminal cases without denial of fundamental right.'' *Id*, 418 F. 2d at 1122.

In what is probably a harbinger of the next step in the development of this Speedy Trial doctrine in this jurisdiction, Judge J. Skelly Wright contended that owing to the fundamental nature of the right, the question of whether the fault for a delay lies with the calendar system or with the prosecution is irrelevant, that while ''recogniz[ing] that the appellate remedy for denial of a speedy trial is a drastic one'' and that ''[n]ormally, the allocation of public resources is not the concern of the judiciary,'' nevertheless ''where . . . such a misallocation leads to the almost blind and mechanical obliteration of a fundamental guarantee against oppression, the drastic remedy is . . . called for.'' *Id.*, 418 F. 2d at 1126.

The only additional factor to be considered, according to Judge Wright's analysis is ''the diligence of the accused in seeking a speedy trial''—a factor which can be ''taken seriously'' only if, as here, the defendant is free pending trial. But that factor is of little or no weight here because it cannot be said that the defendant has not made a serious and conscientious effort to procure a speedy trial in light of the fact that his records were made available voluntarily —and in their entirety—to the United States Attorney's Office many months ago.

It is difficult to see how it could be argued that defendant's ability to defend himself has not been impaired. Along with the only-to-be-expected impairments flowing naturally from a delay of such duration, there is the additional fact that during all that time, all of defendant's records bearing in any way upon the transactions complained of have been in the custody of the prosecution and unavailable to the defense.

Given these circumstances, it cannot but be presumed that the delay in the instant case is the result most likely of purposeful, vexatious and oppressive intent by the Government or at the very least of negligence and indifference to

defendant's rights rising to the level of a denial of Due Process.

Respectfully submitted,
JACKSON, GRAY & LASKEY
By /s/ *T. P. Jackson*
Thomas Penfield Jackson

By /s/ *James P. Schaller*
James P. Schaller
1828 L Street, N. W.
Washington, D. C. 20036
Attorneys for Defendant Marion

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of Points and Authorities in Support of Defendant Marion's Motion to Dismiss Indictment for Failure to Afford Speedy Trial was mailed, postage prepaid, to Sandor Frankel, Esq., Ass. U. S. Attorney, Room 3136-C, U. S. Courthouse, Third and Constitution Avenue, N. W., Washington, D. C. 20001.

/s/ *James P. Schaller*
James P. Schaller

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA vs. WILLIAM R. MARION AND SAMUEL C. CRATCH, *Defendants.*	Crim. No. 672-70

Washington, D. C.
Monday, June 8, 1970

The above-styled cause came on before THE HONORABLE GEORGE L. HART, JR., United States District Judge, at 11:00 o'clock a.m.

APPEARANCES:

On behalf of the Government:
SANDOR FRANKEL,
Asst. U. S. Attorney.
On behalf of Deft. Marion:
THOMAS P. JACKSON, Esq.
On behalf of Deft. Cratch:
BEN COTTEN, Esq.

* * * *

[2] PROCEEDINGS

The Deputy Clerk: Case of United States versus William R. Marion and Samuel C. Cratch, Criminal No. 672-70.

The Court: All right, gentlemen. Where do we stand in this matter?

Mr. Jackson: May it please the Court: Thomas P. Jackson. I represent the defendant William R. Marion, Sr. I understand there are several motions on for hearing this morning.

The Court: All right.

Mr. Jackson: And I assume you also would like to have a status report from both sides.

The Court: Yes.

Mr. Jackson: I believe in chronological order the first motion before Your Honor is the motion of the Defendant Marion to dismiss for failure to afford him a speedy trial. And the authorities bearing on the subject both in favor of the Government and in favor of the defendant I think are adequately treated in the memoranda filed by both sides. The facts specifically are as follows: This indictment charges the defendant William R. Marion as a principal of a corporation known as Allied Enterprises, Inc., with making false and fraudulent representations to a class of persons known as homeowners in the District of Columbia.

The indictment charges that the events which comprise [3] the substance of the charges against him occurred from March 15, 1965 to February 6, 1967. The last act, however, specifically charged in the indictment is January 19, 1966, which is count 19 of the indictment, no later date is mentioned in the indictment.

The February 6th date, February 6, 1967 date is in all likelihood the date on which the Federal Trade Commission issued a cease and desist order against Allied Enterprises and these two defendants, and directed them to discontinue the practices which comprise the substance of the indictment, and as of that date no further activities took place. As a matter of fact, they had ceased business substantially before then. And so the dates with which we are primarily concerned are the dates of March 15, 1965 through January 19, 1966.

We submit that this is an unconscionable period of time within which to defer criminal prosecution of someone for a business-type crime, particularly considering the notoriety with which the activities of this corporation, among others, became known in the District of Columbia.

Now, Your Honor should have before you a pleading entitled Exhibits A through N of the Defendant Marion's motion to dismiss the indictment, which constitute the newspaper articles relative to this particular crime. I think it would help if Your Honor would find those, they should be in the file.

[4] The Court: I have seen them somewhere, but I don't see them now. Have you copies of them there?

Mr. Jackson: I have, but my copies are illegible because they are white on black photostats and we copied them on the Xerox machine. They were filed on Thursday of last week.

The Court: Well, that is why I do not have them. It takes two or three weeks for things to filter around to me.

Mr. Jackson: Well, I have excerpts from the articles to which I will refer and perhaps Your Honor can look at them yourself at the conclusion of the hearing this morning.

The point is that this is a crime—or the crimes charged here are matters which were of intense public knowledge, general public knowledge, from October of 1967.

The Court: Haven't there been several suits filed in this court on it?

Mr. Jackson: Yes, there have been. The one with which I am familiar now is a civil class action now pending by three named plaintiffs against these defendants and Allied Enterprises, and a number of other entities mentioned in those newspaper articles, Atlas Credit Corporation, and so on, the gist of which is to cancel promissory notes and deeds of trust.

The Court: Isn't that before me?

Mr. Jackson: I don't know, Your Honor.

The Court: It seems like I have one like it anyway.

[5] Mr. Jackson: I can give Your Honor the civil number. It is 2451-68, and our case file does not reflect whether or not that case has in fact been assigned to you.

In any event, the events charged here took place from March of 1965 through January of 1966. In early February of 1967, the Federal Trade Commission considered, deliberated upon and issued a cease and desist order in this matter.

In October of 1967 the Washington Post, after a lengthy investigation by its reporters, it says, dealt in extreme detail with what they regarded as fraudulent or illegal second mortgage practices in the District of Columbia, and were in virtually daily contact with the U. S. Attorney's office about it, and the indictment in this case was not returned until April of 1970.

When Your Honor examines the articles to which we have referred and are contained or have been filed as ex-

hibits to the motion, you will discover that about the time that these articles were appearing the 1967 World Series was in progress and to illustrate the difficulty of defending oneself against a charge this stale, consider if you will the difficulty in remembering who the participants in the 1967 World Series were and what was the outcome of that series, much less of what took place at any game.

The Court: It's good you asked me that instead of Judge Fahy.

[6] Mr. Jackson: I would like to call Your Honor's attention to specific provisions in these articles. The first article appeared in the Washington Post on Saturday, September 30, 1967.

By the way, Mr. Frankel has been good enough to say that I may represent to the Court that we stipulate to the authenticity of these particular articles.

The series began on September 30, 1967 on page A-1, Washington Post, first column, and in paragraph 4 it says:

> "The home improvement companies who obtained the mortgages—and the creditors who bought and are now collecting on them—are being investigated by United States Postal Inspectors, the Federal Housing Authority, the Federal Trade Commission and the Department of Justice."

In paragraph 6, sub-head "indictments expected:"

> "In the wake of this newspaper's investigation, U. S. Attorney David G. Bress said he expected indictments in the cases here within two weeks."

Page A-6, column 1, third full paragraph says:

> "The United States's Attorney's office here first began receiving complaints about some of these firms [7] more than two years ago. Two isolated indictments—charging the officers of one firm with forgery and the notary public for another with false notarization—were handed down early this year."

In the fifth full paragraph it says:

> "On March 30, Federal investigators sent United States Attorney Bress a lengthy report on the activities of one firm. The report also contained a strong indication that there were many other firms in the District engaged in similar schemes."

Under a sub-head, "Fraud Squad set up," it says:

"In July, after the Washington Post investigation began at the courthouse, Bress decided to set up a special fraud squad in his office to work on the case 'because of the voluminous nature of the investigation.' "

"Bress said this week that the fraud charges are 'not the crimes of violence that I am now primarily interested in, of course, but it is the kind of illegal conduct we will look into.' "

It continues in column 2:

[8] "Two Federal agencies, the Federal Trade Commission and the Department of Justice are looking into Atlas' activities in a number of cities including Washington."

Atlas Credit Corporation is alleged to be one of the purchasers of the second trust notes.

It was again treated on October 1st, 1967, again on page A-7 on Monday October 2nd there was another article dealing with another firm. On Wednesday, October 4th they dealt specifically with Allied Enterprises and Mr. Marion and Mr. Cratch. And on the first page of the Washington Post, paragraph 3, it says that the purchaser whose photograph appeared on the front page of the paper——

"She is one of scores of customers of six local firms who sold intercoms and water softeners during the past five years and whose sales practices are now under investigation by Federal authorities."

Paragraph 8:

"The six firms are among a dozen under investigation by local and Federal authorities for their second-mortgage practices."

Page A-8, column 4, sixth full paragraph:

"But a Federal Trade Commission examiner found [9] earlier this year that 'few, if any' of Allied's customers received 'enough referral commissions to obtain their intercom at little or no cost.' "

Which is precisely the allegation made in the indictment against these defendants.

The Federal Trade Commission report which was issued and published on February 6, 1967 is appended to the list of exhibits which we have submitted to Your Honor as Exhibit A.

In the Washington Post on Thursday, October 5th, 1967, on page A-18, column 3, the first full paragraph again, it referred to the fact that all of these companies were under investigation by Federal authorities.

On Sunday, October 8, page A-14, column 2, the ninth full paragraph, it says:

> "U. S. Attorney David G. Bress began an intensive investigation into the practices of a dozen home improvement firms here in the wake of the four-month investigation by the Washington Post.
>
> "U. S. Postal Inspectors and the Federal Trade Commission are also investigating these firms. But Bress's two-month old "fraud squad" consists of a single assistant U. S. Attorney and another man on loan from the Department of Justice. No special U. S. [10] Grand Jury has been called to investigate."

That was on Sunday.

On Wednesday, October 11, page A-1, column 5, paragraph 4, it says:

> "Meanwhile, the U. S. Attorney's office announced that a special grand jury, which was sworn in Monday, will conduct its own investigation of the second-mortgage schemes. It will sift information now being gathered by Federal investigators and prosecutors."

It continues on page A-4, first full paragraph:

> "The special U. S. grand jury will divide its time between the local second-mortgage disclosures and an unrelated investigation of the financial affairs of Representative Adam Clayton Powell.
>
> "Assistant U. S. Attorney Seymour Glanzer and Justice Department attorney John R. Risher, Jr., a specialist on frauds, will present the evidence on second mortgage schemes to the grand jury.
>
> "Glanzer and Risher were assigned by U. S. Attorney David G. Bress to staff a special 'fraud investi- [11] gation team' in July after reporters began their own investigation of the second mortgage practices.
>
> "When last week's series of articles began, Bress relieved Glanzer of other duties to concentrate on the fraud investigation. He had also been carrying a normal prosecutor's caseload up to then.
>
> "According to Alfred Hantman, Bress's chief assist-

ant, the investigation is intended to go beyond the salesmen and other lower-echelon employees of the suspected firms who have usually been the only ones indicted in the past in similar investigations here and elsewhere."

The Court: I may say that this occurred during a period when I was trying to get the Department of Justice to give more U. S. Attorneys, Assistant U. S. Attorneys to this jurisdiction, and Mr. Bress said he didn't need any.

Mr. Jackson: I recall something about that, Your Honor.

In any event, not later than October, 1967, the U. S. Attorney was saying—he was quoted as saying he expected indictments within two weeks, he had set up a special fraud [12] squad to deal with this problem, he assigned somebody specially to head the fraud squad and he relieved him of other duties and there was a Justice Department specialist working on the project with them and that a grand jury had been convened to hear the evidence necessary to return an indictment.

The grand jury which actually returned this indictment was sworn in on September 2, 1969, not 1967, and it returned its indictment in April of 1970.

Now, a physiological fact of which I am sure Your Honor could take judicial notice is that memories attenuate as to what transpired, and they particularly attenuate as to any ordinary business transactions, the usual routine course of one's business over a period of time.

The Court: I am not sure these alleged activities are business transactions, but——

Mr. Jackson: Well, whether they constitute the crimes of which they are charged, of course, is the issue of law to be tried in this particular case. The fact remains, however, that Allied Enterprises was in the business at the time of selling and installing home intercom systems in a number of homes in the District of Columbia.

It will probably be revealed that what transpired in these particular cases didn't differ materially from what took place in most cases, the general routine operation of the [13] business which the Federal Trade Commission didn't seem to like, was conducted in much the manner that is alleged here.

The Court: I hope that is not routine business practice. If it is, it ought to be stopped.

Mr. Jackson: Perhaps it ought to be.

The Court: Assuming the allegations are true—not assuming, but if we would for the purpose of argument consider it true, then this is a terrible way to run a business.

Mr. Jackson: It undoubtedly is not the most respectable business practice, there is no question about that. Whether or not it constitutes a crime, or what was actually done—let's put it that way—I am quite sure as the evidence emerges it will not be shown to be, the evidence will not show that what was alleged in the indictment was done in precisely that form, although there will be no dispute as to the fact that there was a sales referral plan and that people were signing notes and gave deeds of trust to secure payment of the contract.

The Court: Dean, call down and ask if 2451-68 isn't a case assigned to me.

Mr. Jackson: The cases that deal with the question of whether or not or what constitutes a speedy trial and in what circumstances a speedy trial has been denied or not denied or when it will constitute grounds for dismissal of an indictment are sufficiently numerous in this jurisdiction so [14] that we really don't need to look elsewhere to determine what the law is with respect to it. Suffice it to say that our Court of Appeals has considered that question in a number of instances, and have expressed themselves in a number of instances as critical of the practice of delaying the business of calling one to answer a charge of a crime for an unsconscionable period of time and in some instances merely the exigencies of investigation or of the allocation of judicial resources coupled with the failure to show actual prejudice has been found not to warrant dismissal of the indictment.

Nevertheless, under the circumstances of this case—and this case I think is unique on its circumstances—perhaps the closest case in analogy is the Taylor case in 1956 which is cited in our memoranda, and in that case the delay was between the alleged commission of the crime and the return of the indictment, and in that case Judges Edgerton, Danaher and Bastian reversed a conviction and specifically on the grounds of a failure to afford a speedy trial and they

did not require in that case any specific showing of actual prejudice. As a matter of fact, the Court said that the long delay "certainly prevented him or his attorney from preparing a proper defense."

This was a delay of roughly the same period of time we have involved here. And that the defendant's imprisonment [15] in another jurisdiction and his own failure to insist upon a trial did not waive his right to a speedy trial. The Court said the long lapse of time between the commission of the offense and the trial and the incarceration of the appellant throughout the entire interim and resulting handicap of it or any other defense must certainly have handicapped the preparation of the defense. That is a quotation from page 262 of 238 F2.

I am sure Your Honor is also familiar with the case of Ross, 1963, which some people have said applies only to narcotics situations, but the rationale of Ross does not limit itself to narcotics cases. The rationale relates to the difficulty of remembering specifics of transactions which took place over a long period of time or which took place a long time ago, in which the Government is aided by a memory refreshing recollection, recorded past recollection, and the defendant has no such memory device.

In conclusion we would submit that the intense notoriety that the activities of these particular companies enjoyed, if you will, in October of 1967, and the specific knowledge of the U. S. Attorney's office and the concern of the U. S. Attorney's office with what took place, and the repeated suggestions that indictments were expected momentarily, and that special teams had been assigned to investigate and [16] prosecute, do not permit the Government to wait until March of 1970 or April of 1970 to ask somebody to defend himself against crimes that were alleged to have occurred over a period of twenty-four months, nearly five years ago.

The Court: All right, counsel.

Mr. Cotten: Your Honor, I am Mr. Cotten representing Mr. Cratch, and I have adopted both by praecipe and orally previously the various motions filed on behalf of Mr. Marion inasmuch as I feel they apply as fully and appropriately to Mr. Cratch as they would to Mr. Marion.

I would address myself to one other point in connection with this. The Government in its opposition to the written

motion attempts to point out that there was a distinction made between a post-arrest delay and a pre-arrest delay. As a matter of fact, it cites in its brief the case of U. S. versus Fineberg, 383 F 2 page 60, a 1967 case.

A perusal of that case, Your Honor, brings forth the points that support our motion. I would just emphasize that rather than attempt anything that would be repetitive, in that case it is set forth that pre-arrest delay, page 64, Your Honor, is usually free of the sometimes damaging effect of any excessive post-arrest delay because one does not have the burden of having been publicly accused.

Of course, in this case, where the facts were presented [17] very ably by Mr. Jackson, we contend there has been a public accusation.

Further, on page 651 it sets forth the fact that itself a pre-arrest delay may very well impair the capacity of the accused to defend himself, and it sets forth therein in the following paragraphs numerous areas into which the court must inquire, not only the memory Mr. Jackson referred to, but with specific reference to the witnesses who may now be unavailable, some of the other references it makes as a matter of fact refer to the Powell versus U. S. 122 U. S. Court of Appeals, page 229, and they feel that there are a series of areas that have to be inquired into, and along this same refutation, if you will, the Government's position I would add, when he attempts to distinguish the cases of Taylor and Ross on the grounds that it was a specific memory or that it had to do with the facts that they were unable to recall a specific event, I would simply refer to the fact that here we are being accused or standing accused of a variety of events greater than specifics in detail to any other Taylor or Ross case. Therefore, it would be more appropriate than less appropriate.

The Court: Do I also understand that the records of the defendants have been in the hands of the U. S. Attorney since the summer of 1968 and not available to the defendant?

Mr. Jackson: That is correct, Your Honor, Mr. Marion, [18] to his best recollection, says that those records were transferred to the U. S. Attorney's office in the summer of 1968. I must point out to Your Honor in his opposition to our motion to dismiss, Mr. Frankel indicates two specific

dates in 1969 on which he thinks those records were delivered. Whenever it was, it was not later than early 1969 and it was according to the defendant's recollection, the summer of 1968, and that on the occasion in which he did bring those records in or made them available he freely discussed the matter with the U. S. Attorney's office and explained to them what his transaction was and to his knowledge he was not at least before the Federal Trade Commission pleadings aware of the fact that he was proceeding unlawfully and those records have been in the Government's possession that period of time.

The Court: All right.

Mr. Frankel: Good morning, Your Honor.

As the Government understands the rule of law that is applicable to this case, Your Honor, a motion to dismiss for failure to afford speedy trial based on the time interval between the date of the alleged offense and the date of the indictment does not lie in the absence of a showing by the defense of some prejudice. That is the rule as we understand it. That has been adopted by every Federal circuit that has spoken on the issue, including the Court of Appeals for this circuit, the Second, Fifth, Sixth, Seventh, Eighth, [19] Ninth and Tenth Circuits, on the basis of the cases we have submitted to Your Honor.

The Court: Of course, the very nature of the thing might infer prejudice in a given case.

Mr. Frankel: Your Honor, it could conceivably be a different situation if at time of trial there is some showing of prejudice. But in the cases that we have been able to find, that has not been the case.

The Court of Appeals for this circuit in its two most recent pronouncements in cases one of which was decided after we submitted our motion, has stated in the case of Troy V. Post against U. S., Criminal No. 208-61, decided October 15, 1968 by a panel of the Court of Appeals for this circuit in footnote 3 I now quote from the opinion interprets the Tynan case as requiring "prejudice, a condition, the record negates relating from the delay."

Now, it may be at some future time the record will suggest some prejudice, I don't see how it can, but at this point, at any rate, it does not, at this stage of the proceedings.

In the most recent occasion, issue came to the attention of the Court of Appeals, the Orsinger opinion, U. S. No. 22756 decided June 3, 1970 by the Court of Appeals for this [20] circuit, a five-year delay between the date of the alleged offense and the date of the indictment did not provide the grounds for a motion to dismiss for failure to afford a speedy trial in the absence of some prejudice. That was a five-year delay, Your Honor.

The Court: In that case, I don't think the facts were known at the beginning, were they?

Mr. Frankel: That is not clear from the opinion, and I don't know from my personal knowledge, Your Honor.

But there has been no case that we have been able to find that has been suggested to us by the defense which suggests this kind of a motion is an appropriate one in the absence of some showing of prejudice, and if that is the rule of law that we are to follow, then the Court's attention I think should be focused on what areas of prejudice have been suggested to the Court.

The only suggestions are rather vague ones, none have been suggested during oral argument beyond the generalized notion that memories weaken over a period of time. That is the reason for the Ross opinion, that is the reason for the Taylor opinion, but the Court has said in Taylor "we do not rely on the mere passage of time between the commission of the offense and the date of indictment for that is governed by the statute of limitations."

[21] They found prejudice in Taylor. The prejudice was that an individual had to recall a specific act on a specific day and his activities on that day he is alleged to have committed housebreaking and robbery.

In this case the defendants are called upon to account for their actions over a more prolonged period of time dealing with their general business practices as officers and employees of Allied Enterprises.

The Court: Let's take count 4, for example. There the defendants are called upon to respond to an allegation of a telephone call made on December 16, 1965, almost five years ago. How are the defendants going to respond to that?

Mr. Frankel: Your Honor, the way that that particular aspect of this particular count would be proved would be

through the mouth of the person who supposedly received this telephone call, and the defendants would be expected to know that their customers, the homeowners in this case, were contacted either by door to door solicitation or by telephone calls.

If there were any specific actions, Your Honor, that they are called upon to account for in this indictment, or that they are called upon to remember during the course of this trial, and if they have honestly got to say I don't remember, at that stage it might be appropriate for the Court to consider whether they have been so severely prejudiced by the [22] passage of time as to warrant at that time a dismissal of the indictment. But at this stage all the defense is claiming is that on page 3 of their motion to dismiss the production of evidence both testimonial and documentary may have become unavailable by the passage of time. There is not even a specific allegation that it in fact has.

There is no suggestion, Your Honor, of the nature of this evidence, the nature of the testimony, the witnesses who have become unavailable as in fact where the Tynan case documentary evidence was destroyed previous to the indictment in that case. The Court of Appeals nevertheless ruled that was not sufficient prejudice. Here there is not even a claim that testimony or documents have become unavailable, merely the suggestion that they may have.

The allegation that documentary evidence has become unavailable is really belied by a subsequent allegation of prejudice at page 7 of the memorandum in support of defendant's motion to dismiss where the defendant alleges during the interval between either the summer of 1968 or as we suggested January of 1969 all the defendant's records bearing in any way upon the transactions complained of have been in the custody of the U. S. Attorney's office and available to the defense.

In the first instance if those documents have been in our possession, Your Honor, if all documents relevant to their [23] conduct, to Defendant Marion's conduct of the business has been in our possession, it is difficult to see how those have become unavailable. The Government has never suggested to the defense they don't have total right to inspect all those documents.

The Court: Well, tell me this: Why, why was this infor-

mation in the hands of the U. S. Attorney in 1967? Why was not some action taken on this until April, 1970? I guess it is really an unfair question to ask you, since we have a new U. S. Attorney and new assistants since then, but still it is a puzzling situation.

I remember this thing back in 1967, and I remember how outraged I was by the reports in the paper of these poor people who were being—if one could believe the reports—terribly victimized by these outrageous business practices, and yet nothing is done about it for three years. I frankly don't understand it.

Mr. Frankel: Let me say first, Your Honor, although I have agreed as Mr. Jackson points out to the Court, I have stipulated to the authenticity of the documents that have been filed with the Court, I am not in a position to accept or reject the substantive allegations of those articles. But even assuming them to be true for purposes of this hearing, Your Honor, in the first instance I can only report to the Court what has been reported to me as to the reasons for [24] the delay. I was not an assistant U. S. Attorney at the time of these newspaper articles. I can only tell the Court that it has been represented to me that the U. S. Attorney's office at the time was not sufficiently staffed to proceed as expeditiously as Your Honor might have liked for us to proceed.

The Court: I know quite well it wasn't well staffed, and I quite well remember asking Mr. Fred Vinson, the assistant to the Attorney General, to come over to my office and discuss the matter, and having Mr. Bress say to Mr. Vinson when I told him the office was horribly understaffed that he didn't need any more help.

Mr. Frankel: Your Honor, all I can do is represent to the Court what has been represented to me. If those were the representations made to Your Honor, there is no way I can respond to that fact.

The Court: I guess there isn't.

Mr. Frankel: All I can tell Your Honor is that in fact it has been represented to me as a fact that the man in charge of the prosecution of fraud cases in the District of Columbia for the U. S. Attorney's office was at that time unable because of his heavy caseload and the heavy caseload of the office otherwise, the case could not be shipped out to

handle this case at the time of the articles that are brought [25] to the attention of the Court.

But let me suggest to the Court furthermore, even if these manpower problems did not at that time exist, the standard as we understand it to be applied by Your Honor in determining this motion is whether at this juncture of the proceedings there has been any evidence of prejudice anticipated by the defense.

The cases that we have cited, the Feinberg case referred to by Mr. Jackson, there was a five-year statute of limitations in that case. The indictment was not brought until four years and eleven months had transpired from the date of the offense to the date of the indictment.

In the Tynan case there was a several-year delay and the Tynan case itself distinguished the Ross case by suggesting in the case where you have a kind of mail fraud or scheme involved which covers a more protracted period of time than one simple sale of narcotics covers, then the prejudice you can reasonably anticipate is of a different nature and in fact is more difficult to anticipate and is something one would not expect to anticipate as easily as you would expect to anticipate the difficulty of a narcotics seller recalling one specific day seven months earlier which he has no reason to remember.

The Court: Well, it might be a lot easier to remember a [26] single transaction or a single day seven months ago than to remember something over four years later, four to five years later, remembering 19 specific transactions.

Mr. Frankel: If I may respond, Your Honor, as we suggest in our memorandum, the nature of the Government's evidence in this case is largely documentary and is largely based on the general practices of people, the defendants and their associations with Allied Enterprises. We are not expecting them and they are not called upon to recall specific instances divorced in nature in any significant degree from the rest of their dealings with Allied Enterprises.

This was a business, Your Honor, that was carried on for over a year. It was not a specific isolated incident. It may be that at some later stage of the proceedings, either at trial or after trial, or at sometime before trial, the defense could suggest to the Court exactly how they have been prejudiced, which witnesses they now claim may have be-

come unavailable, the memories of the witnesses at the time of trial have become so withered as to warrant this Court's setting aside the indictment, what documents have been lost. In fact, no documents have been lost. On the basis of the allegations of the defendants' motion themselves, it claims all the documents still exist in the U. S. Attorney's office.

The fact that there was a proceeding brought before [27] the FTC, the fact that there has been since 1968 a civil action pending in this case in which the Defendant Marion has been represented by the counsel that he has been so ably represented by in this matter suggests that he has been put on notice that he has every reason to have remembered his dealings with Allied Enterprises and not to have let business dealings of over a year suddenly those business dealings evaporate from his memory.

In brief, Your Honor, without being repetitious, if at some stage of the proceedings the defense can suggest to the Court what prejudice has been shown them, then the motion could conceivably lie or at least could conceivably be re-argued, but at this stage with no showing of prejudice whatsoever, Your Honor, I think the motion should be denied.

Mr. Jackson: As Mr. Frankel has suggested at several points, he seems to think there must be some showing of specific prejudice at this point in order to warrant a dismissal of this indictment, and I submit that the general prejudice which flows from the attenuation of human memories is apparent in this case and need be on the basis of the Taylor case no further elaborated to warrant a dismissal of the indictment.

Actually, he is saying we will dismiss when you can show or it's possible to dismiss when you have shown specific prejudice or inability to remember something, but not before, and this places the defendant on the horns of an [28] impossible dilemma.

If the defendant is called to answer a question, Mr. Marion, did you have a telephone conversation with Mr. so and so on December 15, 1965, if he answers that question truthfully and says I just don't remember, then of course the proponent of whatever transpired in the course of that telephone conversation is believed. He has not refuted

anything which was said by the other party to the conversation, tending to incriminate him.

If, on the other hand, he tries to testify from the best of his recollection as to this one specific telephone conversation which took place in the course of some twenty-five months of business activities, then of course the suggestion is, well, he testified to it, he seemed to know what happened so his memory hasn't failed, has it?

It is perfectly obvious to everyone that memories do fail and particularly memories as to events occurring in the ordinary course of business some five years ago or very nearly five years ago, and that we submit on the basis of the Taylor case alone that is sufficient to warrant a dismissal of the indictment.

It is too late to ask these people to respond to criminal charges some nearly five years after they were supposed [29] to have occurred and while the information was in the U. S. Attorney's office and could have been brought momentarily for over three years or for a three-year period.

The statute of limitations does not govern this particular matter. The statute of limitations cannot modify the Sixth Amendment, right to a speedy trial. The Congress could not pass a statute of limitations providing for a five-year statute of limitations or no statute of limitations on criminal conduct and then say whatever the statute of limitations happens to be controls the measure of the right to a speedy trial under the Constitution.

The Orsinger case, which Mr. Frankel cited to Your Honor just a little while ago deals only with the details of a lengthy investigation of a complex series of business transactions being conducted by Mr. Orsinger for a long time with the unbeknownst accommodation of the clients he was supposed to have represented and who were not aware of the fact that they had been improperly treated by Mr. Orsinger until a long period of time had elapsed. And then there followed from that an investigation which was vigorously resisted by Mr. Orsinger in each case.

In this case all the facts were known to the Federal Trade Commission in 1967. If the U. S. Attorney's office had not communicated with the Federal Trade Commission they would have known of them by reading the Washington [30] Post in October of 1967 and as we have said before, no

need to repeat, the indictment was not returned until April of 1970 and that is too long a period of time to wait.

The Court: It appears to the Court that the matters complained of occurred between March 1965 and January 1966. It further appears that these matters were known from early 1967 or a matter of common knowledge in late 1967. There appears no reason why a three-year delay from 1967 was justified by the necessity of research and examination delving into the various transactions, they could have been discovered and handled much, much sooner, certainly probably during the year 1967 or at the latest early 1968.

The defendants have been indicted on 19 counts, each of which I believe carries a ten-year sentence, each of which is a separate, distinct transaction which would justify consecutive sentences, and by the very nature of this outrageous scheme if the allegations could be believed, the ability to remember, to build up in one's recollection, to produce the necessary defense, is bound to have been seriously prejudiced by the delay of at least some three years in bringing the prosecution that should have been brought in 1967, or at the very latest early 1968.

The Court, therefore, views that there has been a lack [31] of speedy prosecution in this case, and will grant the motion to dismiss.

The Deputy Marshal: This Honorable Court stands recessed until return of Court.

(Thereupon, at 11:45 o'clock a.m., hearing in the above-styled cause was concluded.)

* * * * * * * * * * *

CERTIFICATE OF REPORTER

I hereby certify that the foregoing 31 pages constitute the official transcript of proceedings had in the above-styled cause.

/s/ E. A. Kaufer
Official Reporter

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 672–70. Criminal

UNITED STATES OF AMERICA

v.

WILLIAM R. MARION, SR., ET AL.

ORDER

Upon consideration of the Motion of the defendant William R. Marion, Sr., to Dismiss Indictment for Failure to Afford Speedy Trial (adopted by the defendant Samuel C. Cratch, Jr.), and the Memoranda of Points and Authorities and Exhibits submitted in support thereof and in opposition thereto, and the oral argument of counsel thereon, for the reason set forth in the oral Opinion of the Court of June 8, 1970, it is, this 8th day of June, 1970.

Ordered, That the Motions to Dismiss the Indictment be and they are hereby granted as to both defendants, and the Indictment, and each Count thereof, is dismissed as to both defendants.

/s/ George L. Hart, Jr.,
Judge.

I hereby certify that copies of the foregoing and annexed Order were this 8th day of June, 1970, mailed, postage prepaid, to Sandor Frankel, Esq., Assistant United States Attorney, United States Courthouse, Washington, D.C., and to Benjamin W. Cotten, Esq., attorney for Samuel Cratch, 1314 19th Street, N.W., Washington, D.C.

s/ T. P. Jackson
Thomas Penfield Jackson

A True Copy
Robert M. Stearns, Clerk
By Esther E. Cueden, Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 672–70. Criminal

UNITED STATES OF AMERICA

v.

WILLIAM R. MARION, SR., SAMUEL C. CRATCH, JR.

NOTICE OF APPEAL

Notice is hereby given that the United States of America hereby appeals, pursuant to 18 U.S.C. § 3731, to the Supreme Court of the United States from the order of this Court entered June 8, 1970, dismissing the indictment herein.

THOMAS A. FLANNERY,
United States Attorney.
JOHN A. TERRY,
Assistant United States Attorney.
SEYMOUR GLANZER,
Assistant United States Attorney.
SANDOR FRANKEL,
Assistant United States Attorney.

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing notice of appeal has been mailed to Thomas P. Jackson, Esquire, counsel for defendant Marion, at 1828 L Street, N.W., Wash., D.C. 20036, and Benjamin W. Cotten, Esquire, counsel for defendant Cratch at 1314 19th Street N.W., Wash., D.C. 20036, this 8th day of July, 1970.

JOHN A. TERRY,
Assistant United States Attorney.

SUPREME COURT OF THE UNITED STATES

No. 810———, October Term, 1970

UNITED STATES, *Appellant,*

v.

WILLIAM R. MARION AND SAMUEL C. CRATCH

APPEAL from the United States District Court for the District of Columbia.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

March 1, 1971

☆ U.S. Government Printing Office: 1971—422-103/579

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM R. MARION AND SAMUEL C. CRATCH

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The district court did not deliver a written opinion. Its oral explanation of its ruling is set out in Appendix A, *infra,* p. 11.

JURISDICTION

On June 8, 1970, the United States District Court for the District of Columbia entered an order dismissing the indictment on the ground of lack of speedy prosecution (App. B., *infra,* p. 12). A notice of appeal was filed on July 8, 1970 (App. C, *infra,* p. 14). On August 28, 1970, the Chief Justice extended the time for docketing the appeal to and including October 6, 1970. The jurisdiction of this Court rests on 18 U.S.C. 3731, which authorizes a direct appeal from a decision sustaining a motion in bar where the defendants have

405-622—70——1

not been put in jeopardy. See, *e.g.*, *United States* v. *Blue*, 384 U.S. 251.

QUESTIONS PRESENTED

Whether an indictment may properly be dismissed because of pre-indictment delay that was not purposeful, oppressive or actually prejudicial to the defendants.

STATEMENT

On April 21, 1970, an indictment was filed in the United States District Court for the District of Columbia, charging appellees with mail fraud (four counts), wire fraud (one count) and transporting falsely made securities in interstate commerce (fourteen counts), in violation of 18 U.S.C. 1341, 1343, and 2314. The indictment alleged that from March 15, 1965 to February 6, 1967, appellees had operated a business in North Brentwood, Maryland, known as Allied Enterprises, Inc., which sold and installed home intercom systems, fire control systems, burglary detection systems, and the like; that they had induced homeowners to enter into contracts through false promises; that after making token starts on the installation work specified in the contracts, appellees induced the homeowners to sign partially executed deeds of trust or promissory notes, which they thereafter secretly altered and transferred to persons or firms who purported to be holders in due course; and that in furtherance of their scheme appellees committed the conduct forming the basis for each count in the indictment. Twenty-one named individuals and

"divers other persons" were described as victims of the scheme.

On May 5, 1970, appellees filed a motion to dismiss the indictment on the ground that they had been denied a speedy trial. At a hearing conducted by Judge Hart on June 8, 1970, the following was adduced.[1] In September and October 1967, the Washington Post published a series of articles dealing with deceptive practices of certain home improvement companies. Although most of the articles exposed the fraudulent operations of another firm, on October 4 the newspaper mentioned appellees and their company, Allied Enterprises (Tr. 7–8). On several occasions the Post articles contained comments by the then United States Attorney for the District of Columbia to the effect that his office had begun intensively investigating the practices of the home improvement firms; that a two man "fraud squad" had been specially designated to investigate allegations of deception; that a special grand jury sworn on October 9, 1967, would devote some time to reviewing the practices of companies mentioned in the newspaper articles; that his office had been receiving complaints for two years, and two indictments (not connected with the defendants) had already been filed earlier that year; and that he expected indictments in the present cases within two weeks (Tr. 6–11). The newspaper also quoted the United States Attorney as stating that the fraud claims are "not the crimes of violence

[1] No witnesses were called by either side at the June 8 hearing. The factual description is derived from the colloquy between the court and counsel.

I am now particularly interested in, of course, but it is the kind of illegal conduct we will look into." (Tr. 7). The indictment against defendants was not filed until April 21, 1970. The grand jury, which returned the indictment, had been sworn on September 2, 1969.

After quoting at length from the Washington Post articles, particularly the remarks attributed to the United States Attorney, defense counsel argued that the government could have proceeded long before it did, and suggested that defendants' recollections and counsel's ability to prepare their defenses were apt to have been seriously prejudiced by the delay. In counsel's view, the probability of memory lapses, coupled with the "intense notoriety" the case had received in 1967 and the "repeated suggestions" by the United States Attorney that indictments were expected to be returned momentarily, warranted dismissal of the indictment (Tr. 12–16).

Government counsel responded that he had stipulated to the authenticity of the newspaper articles cited by the defense, but not to the truth of their substantive allegations, upon which he was in no position to comment because he was not a member of the United States Attorney's Office at the time. Counsel stated that he had been advised that the delay was evidently occasioned by a heavy case load and an understaffed office (Tr. 23–24). In any event, he noted that no actual prejudice to appellees had resulted from the delay, since the evidence in the case was essentially documentary and the scheme alleged in the indictment would be shown to have been the customary manner in which they conducted business; thus,

they would not be called upon to recite specific detailed instances divorced from their usual dealings. Moreover, the prosecutor cited the existence of several pending civil actions against the defendants, which would necessarily assist them in maintaining their recall. In addition, he noted that pertinent documents in the government's custody had always been available for inspection by the defendants or their counsel. Finally, government counsel argued that a speedy trial claim based upon the possibility of faulty memories resulting from delay was premature at that stage.

Following argument of counsel, Judge Hart issued his order granting dismissal. He ruled that the matters necessary for prosecution had been known to the government in late 1967 and that there was no reason for delaying the indictment almost three years. Referring to the fact that the counts in the indictment involved specific transactions, Judge Hart concluded that "by the nature of this outrageous scheme," the defendants's ability to recollect and prepare their defense was "bound to have been seriously prejudiced by the delay." (App. A, *infra*, p. 11.)

THE QUESTIONS ARE SUBSTANTIAL

At issue in this case are several important questions relating to the right to a speedy trial, not yet decided by this Court and not uniformly resolved in the lower courts. A threshold matter is whether the time elapsing between the alleged commission of an offense and the initiation of criminal proceedings is to be considered at all in a speedy trial claim. Most courts